

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF TEXAS  
SHERMAN DIVISION

3	GIBSON BRANDS, INC.	DOCKET 4:19-CV-358
4	VS.	MAY 13, 2022
5	ARMADILLO DISTRIBUTION	9:34 A.M.
6	ENTERPRISES, INC.; CONCORDIA	
	INVESTMENT PARTNERS, LLC; AND	
	DOES 1 THROUGH 10	SHERMAN, TEXAS

VOLUME 1 OF 1, PAGES 1 THROUGH 73

REPORTER'S TRANSCRIPT OF PRETRIAL CONFERENCE

BEFORE THE HONORABLE AMOS L. MAZZANT, III  
UNITED STATES DISTRICT JUDGE, AND A JURY

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25 PROCEEDINGS RECORDED USING MECHANICAL STENOGRAPHY;  
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1  
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1 (Open court, all parties present by telephone.)

2 THE COURT: Okay. Good morning. This is Judge  
3 Mazzant. Again we're here in 4:19-cv-358. You've already  
4 made your appearances. Just make sure you identify  
5 yourself every time you speak. I know you know the drill.

6 And I will tell you I only -- I have another call  
7 at 10:00, so I only have about 30 minutes. That may or may  
8 not be enough time to resolve this issue; and if you want  
9 to, we can meet up again this afternoon.

10 But let me just first say I know there's been a  
11 flurry of paperwork and emails regarding MILs 6 and 7, and  
12 I first just wanted to say that I know that defense took  
13 issue that the Court granted MILs 6 and 7 without -- I'm  
14 reading from the letter of May 12 -- without the  
15 opportunity for defendants to respond to Gibson's  
16 inaccurate, misleading, and factually incorrect claims in  
17 the letter it submitted.

18 Well, first, let me say I didn't even look at  
19 their letter in that regard. I didn't ask for additional  
20 briefing on 6 and 7, so I actually skipped over that. I  
21 couldn't tell you what it said because I didn't read it. I  
22 went to the other issues that the Court allowed submissions  
23 on and will consider those other issues in due course.

24 But just so defense realizes, I mean, we -- there  
25 was considerable briefing on MILs 6 and 7 which the Court

1 had reviewed as well as argument at the pretrial  
2 conference, and I took the matter under advisement. So  
3 there is no issue here in terms of I'm considering  
4 something that Gibson filed because, again, I didn't look  
5 at it. I just skipped past that issue because I didn't ask  
6 for anything on that issue.

7 So I understand that the defense is not happy with  
8 the Court's ruling. Of course, the Court's ruling is one  
9 that just requires you to approach the bench before you can  
10 get into any of those matters.

11 So I just wanted to set the record straight that,  
12 you know, there was no response necessary because I didn't  
13 consider what they filed. We already had plenty of  
14 argument and briefing on the issue, and I made a decision.  
15 You know, I understand that defense doesn't like it but --  
16 so -- but I wanted to at least set the record straight that  
17 there wasn't anything done improperly because the Court did  
18 not look at that and -- because, again, the Court did not  
19 ask for any comment on that so I did ignore it. But there  
20 had been plenty of briefing on the issue and argument on  
21 the issue the day before, and I just took the matter under  
22 advisement and made a decision.

23 Now, I will give the opportunity -- I know that  
24 defense doesn't like what I did but -- if you want to say  
25 something on the matter, go ahead, but --

1 MS. NAYDONOV: Good morning, your Honor. This is  
2 Anna Naydonov for defendants.

3 And thank you so much for clarifying this for us.  
4 We, by no means, wanted to imply that the Court did  
5 anything improper or anything like that.

6 There appears to be a misunderstanding perhaps  
7 because of the many motions *in limine* involved that, you  
8 know, led to some of the findings that we saw yesterday  
9 about their Motions *in Limine* 6 and 7.

10 Specifically, Court held that defendants did not  
11 contest that Dean Guitars lost prominence and the name went  
12 dormant after it was purchased by Tropical Music and until  
13 Armadillo took over in 1997. We absolutely contest that.  
14 This is actually a hotly contested factual issue, in our  
15 opinion, for the jury to decide. Your Honor, we actually  
16 prepared demonstratives for use in this hearing. Because  
17 it's telephonic, we had them delivered to your chambers in  
18 hard copy and emailed them today.

19 But this is a compilation of extensive and  
20 powerful evidence that completely refutes the argument that  
21 the brand got abandoned and went dormant. The brand never  
22 got abandoned. There was never any loss of chain of title  
23 for the brand.

24 And, your Honor, if I may turn the  
25 Court's attention to some of the examples of this extensive

1 evidence. If you look at Slide 2 in the demonstratives, we  
2 have a stipulated sworn declaration from Tropical Music's  
3 president, who owned -- they owned the Dean brand from '91  
4 to '95, saying that he purchased and is knowledgeable about  
5 ownership and sale of Dean Guitars, Inc., the company. He  
6 also attaches examples of actual guitars sold between '91  
7 and '95 in the United States with the Dean brand.

8 He also says that the Dean guitars were  
9 manufactured in Florida, some were made from scratch in  
10 Florida during the time that Tropical owned the brand, some  
11 of the guitars were sold and distributed in the United  
12 States.

13 Also, he -- if you look at Slide 4, which are  
14 examples of those guitars that were offered and sold in the  
15 United States under the Dean brand, examples of  
16 advertising, that completely refutes the notion that the  
17 mark was abandoned or that the brand went dormant.

18 And Gibson knows that. How do they know that?  
19 Because they questioned, in deposition, Dean's founder,  
20 Dean Zelinsky, and used what is marked as DTX-308 and 307,  
21 which are third-party publications, price guides and media  
22 publications, corroborating the evidence that we would like  
23 the jury to hear.

24 And I quote (as read): "Zelinsky sold Dean  
25 Guitars in 1990 to Oscar Mederos, the owner of Tropical

1 Music. The Dean Guitars facility in Plant City, Florida,  
2 was run by Tracy Jon Hill. The new guitars were  
3 distributed to markets in the U.S. In '95 Armadillo of  
4 Clearwater, Florida, bought Dean from Tropical Music."

5 Now I'm reading from another exhibit that Gibson  
6 knew about, presented, and questioned the founder on in his  
7 deposition. (As read): "In '91 Zelinsky sold the company  
8 to Tropical Music in Miami. From '93 to '94 there was  
9 again limited U.S. California production of the Elite,  
10 Cadillac, and ML models under the supervision of Zelinsky  
11 and Cory Wadley. Korean versions were also produced."

12 So the mark continued to be very much in use.

13 Now turning your attention to Slide 7 in our  
14 demonstratives, DTX-1699, 1993 ads from Tropical times with  
15 Tropical address at the bottom showing Dean-branded guitars  
16 advertised and sold in the United States.

17 Slide 8, 1993 catalog in the U.S. with the Dean  
18 brands under Tropical ownership, advertising and selling  
19 the guitars in the United States.

20 Slide 9, 1994 catalog when Tropical owned the  
21 brand, showing the Dean brand of guitar advertised and sold  
22 in the United States, saying on the back of the catalog the  
23 company has been around since 1977.

24 Then Oscar Mederos of Tropical in his stipulated  
25 trial declaration also said that in the '90s, in the brief

1 time that he owned the brand, he licensed the Dean mark to  
2 Washburn, a major guitar company, for use in products for  
3 guitars for Darrell Abbott, one of the most prominent  
4 guitar players in the world.

5 Slide 10 in the demonstratives, your Honor, 1992  
6 *Guitar World* publication showing Darrell Abbott with his  
7 Dean guitars.

8 Slide 11, '93 *Guitar for the Practicing Musician*  
9 magazine cover showing Dean guitars with Darrell Abbott.

10 Slide 12, 1994 *Guitar* magazine cover. Again on  
11 the cover of the magazine, Darrell Abbott prominently  
12 showcasing Dean guitars.

13 Slide 13, DTX-1702, another piece of evidence we  
14 would like the jury to see, 1996 retail price list with the  
15 Dean brand.

16 Slide 14, 1996 Dean Guitars catalog. At that time  
17 actually, in 1996, Armadillo already purchased the business  
18 from Tropical; and it's a catalog distributed in the U.S.  
19 offering Dean V and Dean Z guitars for sale.

20 Slide 16, 1997 Dean Guitars catalog. On the cover  
21 it says "1977-1997," showing that there has always been  
22 continuity, no break in title, no brand going dormant or  
23 going out of business, and again offering for sale in the  
24 U.S. the Dean V and Z guitars, among other models.

25 So, your Honor, we just wanted to clarify that far

1 from defendants not contesting, we marshaled extensive  
2 evidence that the brand never went dormant, continued to be  
3 in use throughout all these years.

4 And we have sworn testimony from Tropical. Dean  
5 Zelinsky's own founder testified in deposition that he sold  
6 the business to Tropical and Tropical then sold the  
7 business to the current owners, Armadillo.

8 We also will have our music history expert, George  
9 Gruhn, testify that the Dean brands never lost prominence,  
10 never went dormant.

11 There were multiple guitars on the secondary  
12 market, and Gibson's own witnesses admit that secondary  
13 market is one of their biggest competitors and those  
14 guitars were in prominent use.

15 So there was never, never any abandonment; and  
16 Gibson has made this very strange and legally incorrect  
17 argument that -- they are saying that because -- they are  
18 contending that the business was not sold but just the  
19 brand.

20 First of all, the business was sold. Oscar  
21 Mederos testified the business was sold. Dean Zelinsky  
22 testified the business was sold and current owners then  
23 purchased the business.

24 But even if the trademark alone was sold, that is  
25 still sufficient. You don't need to always sell the whole

1 company to transfer rights in the mark.

2 For example, Crunch candy used to be owned by  
3 Nestle. They sold that trademark to Ferrero. Crunch mark,  
4 still well and alive, not abandoned.

5 So even if taken for granted and for truth --  
6 which it's not the truth; they twisted excerpts from  
7 deposition saying they only sold the Dean mark -- that is  
8 still sufficient because a trademark can only be  
9 transferred with the underlying goodwill. And what is the  
10 goodwill here? It's the goodwill in the guitars.

11 So the fact -- even taking for grant -- as true  
12 their representations that only the brand was sold and not  
13 the whole company, that is still sufficient because the  
14 goodwill transferred with the brand.

15 Moreover, your Honor, even if there was no  
16 production of guitars from '91 to '95, which there  
17 absolutely was, we are asking to present the jury with this  
18 evidence of all of these multiple exhibits, catalogs,  
19 *Guitar* magazine covers, price lists.

20 But even if all of that was disregarded, there is  
21 well-established concepts in trademark law called residual  
22 goodwill. In the words of the leading trademark treatise,  
23 even after the sale of product has ended, many consumers  
24 will continue to recognize the mark as a source indicator.  
25 The doctrine recognizes that even after a mark maybe

1 stopped being in use, there is still residual goodwill  
2 among consumers.

3 In fact, the main case on the issue involved  
4 Ferrari Daytona Spyder trade dress. The car was out of  
5 production for 13 years with no plans to resume use; but  
6 the Court, nevertheless, held that there was no abandonment  
7 because of the residual goodwill that persisted in the  
8 marketplace.

9 And here everyone admits there were secondary  
10 markets flooded with guitars from the '70s and the '80s  
11 when -- even Gibson doesn't dispute -- in the '70s and '80s  
12 up until the very brief period with Tropical Music, Dean  
13 brand was well-known, famous, played by ZZ Top, Cars,  
14 Doobie Brothers, on the covers of the most famous  
15 magazines, one of the most well-known brands in rock and  
16 roll and guitar history.

17 So even if there was abandonment, which there was  
18 absolutely not and we're ready to present evidence,  
19 residual goodwill persisted.

20 And regarding -- so that's on the Motion in Limine  
21 Number 6, your Honor. We have multiple evidence, multiple  
22 witnesses who completely will refute and contest that there  
23 was any abandonment. They will show continuity.

24 And, your Honor, I just wanted to point out to the  
25 last slide in our presentation, 16, which is modern

1 advertising from the modern day, the current owners of Dean  
2 Guitars actually touting the history from 1977, saying  
3 "since 1977" or "I created this guitar in 1976" or saying  
4 that the brand has been around and in continuous use.

5 So the jury will be so confused if we are  
6 prevented from telling them what happened and we all have  
7 to pretend that this company didn't exist until '97 when it  
8 totally did. When our CEO is questioned, "How did you come  
9 up with this shape in '97," he will be prevented from  
10 telling the truth to the jury that the brand has been  
11 around since '77 and has existed uninterrupted. So it will  
12 be completely confusing to the jury, and our witnesses will  
13 not be able to tell the truth.

14 On the Motion in Limine 7, which is third-party  
15 usage, the Court's ruling again appears to be grounded in  
16 this misunderstanding that we don't contest that there was  
17 some sort of discontinuation. We do contest that.

18 But also the five-year look-back rule does not  
19 apply in genericness cases, so it would be improper to cut  
20 off the third-party uses at 1992 for two reasons.

21 First of all, as I just described and presented  
22 evidence, there was no abandonment so we can tag back to  
23 1977 so the five-year look-back rule would not go back to  
24 '92 anyway. But, regardless, genericness cases do not  
25 apply this five-year cutoff look-back rule.

1                   Gibson relies on this decision in *Converse*, which  
2 your Honor cited yesterday as well. That decision involved  
3 secondary meaning, not genericness. Secondary meaning is  
4 very different. For secondary meaning, when we have a  
5 descriptive trademark or a descriptive trade dress, the  
6 Lanham Act says you can apply to register; but you have to  
7 show that it's been in substantially exclusive use for the  
8 past five years.

9                   So in *Converse* the issue was can they seek  
10 protection and establish secondary meaning, have they  
11 substantially exclusively used it for the past five years.  
12 That is why, in secondary meaning, five years has any  
13 relevance.

14                   And even then, the Court in *Converse* said -- they  
15 remanded the case and said let's look at the evidence from  
16 before the five years and see if it's relevant. It never  
17 applied the rigid cutoff five-year rule.

18                   But what's most important, Gibson here has not  
19 cited a single case, not from this circuit, not from  
20 anywhere else in the country, saying that anyone has ever  
21 applied this five-year rule in genericness cases.

22                   For genericness, the determination is you look at  
23 the whole history of the use of this mark or shape and you  
24 have to decide do consumers -- has it lost significance,  
25 has there been so many third-party uses that over time have

1 eroded any trademark significance and destroyed the  
2 trademark significance so much so that the mark or the  
3 shape has become generic.

4 So if we look at the genericness cases, they  
5 look -- all look beyond five years and look at the whole  
6 history. Probably the most relevant case is Stuart Spector  
7 Designs against Fender, 94 USPQ2d 1549, where the Trademark  
8 Trial and Appeal Board invalidated Fender's Stratocaster  
9 guitar shape in 2009 but looked at the evidence of  
10 third-party use since the 1970s and said that the record  
11 shows that at least from the mid 1970s, consumers in the  
12 United States have been exposed to guitars in these shapes  
13 emanating from third parties. Based on all of that  
14 collective evidence, in 2009, invalidated Fender's mark,  
15 which should be the result here with the generic shape  
16 here.

17 Another example, Malaco Leaf against Promotion in  
18 Motion, 287 F.Supp. 2d 355, Southern District of New York,  
19 2003, finding that -- the Swedish Fish, fish-shaped gummy  
20 candy, generic based on decades of competitive third-party  
21 gummy fish-shaped candy.

22 And, once again, even the Converse case which  
23 secondary meaning, different concepts, inapplicable,  
24 completely inapplicable here, even they said -- I quote --  
25 evidence older than this five-year period should be

1 reevaluated on remand to determine whether it is relevant.  
2 Even there.

3                   Here, our music history George Gruhn will testify  
4 that for years, since the '60s, scores and scores of third  
5 parties have used this guitar shape. So we have consumers  
6 in the U.S. who are very relevant. They're in their 60s or  
7 70s. Their whole life has been exposed to this generic  
8 shape, and the jury is once again entitled to hear this  
9 evidence.

10                  And, your Honor, as the Fifth Circuit held in  
11 Xtreme Lashes against Xtended Beauty case, 576 F.3d 221,  
12 the determination of whether a mark is weak or whether a  
13 mark is strong should be for the jury. That's what the  
14 Fifth Circuit held.

15                  So we respectfully are requesting that you please  
16 reconsider that ruling and -- for two main reasons. First,  
17 it's a hotly contested factual issue, at the very least,  
18 with marshaled evidence there was never any abandonment.  
19 We should be able to tell our story with consistency, with  
20 no interruption in abandonment, used the Dean Guitars mark  
21 from 1977 to the present. And, second, in genericness  
22 cases it's highly relevant, highly relevant to show that  
23 the mark has been generic for decades; so the arbitrary  
24 five-year look-back rule doesn't apply.

25                  Thank you so much for your consideration. And we

1 apologize for the flurry of last-minute emails, but this  
2 was -- this ruling would be devastating and tantamount to a  
3 summary judgment ruling that would prevent us from telling  
4 our story to the jury. So thank you so much for getting on  
5 the phone with us today.

6 THE COURT: And let me ask, of course, just one  
7 question. So is it your position the name -- Dean name  
8 never went dormant, ever?

9 MS. NAYDONOV: Correct, your Honor, and we have  
10 evidence to present to that effect.

11 THE COURT: Okay. So I will tell you this, is  
12 that as I indicated at the beginning, I only have until  
13 10:00; and so I only have a couple minutes to give the  
14 other side a response since I probably have people probably  
15 calling in now for the 10:00 call.

16 But what I -- I can give you a couple minutes if  
17 you want to respond, but it may be more appropriate if --  
18 that -- if y'all want to just come this afternoon and we'll  
19 have more discussion on this issue.

20 I ask the parties any thoughts. Let me hear from  
21 Gibson real quick. I don't have --

22 MR. HOWEN: Your Honor --

23 THE COURT: -- because I don't really have much  
24 time for you right now so --

25 MR. HOWEN: Your Honor, you're getting beeps from

1 the other calls. Your instinct is what we would say. I  
2 think maybe we just need to talk this afternoon.

3 THE COURT: Okay. Why don't we do that. Do y'all  
4 want to just come here? I have a 2:00 hearing that  
5 hopefully won't take long, so if you want to come -- why  
6 don't we just -- it might be easier to have y'all come back  
7 to the courthouse at 2:30.

8 MS. NAYDONOV: Of course, your Honor.

9 THE COURT: You don't have to necessarily be that  
10 early because I do have a 2:00 call. I don't think it will  
11 take real long but -- so let's just plan on trying to start  
12 around 2:30 and --

13 MR. HOWEN: We'll be there, your Honor. Thank  
14 you.

15 THE COURT: And I'll try to resolve some of these  
16 other issues, too, that are still pending hopefully before  
17 that; but, again, I have a number of these calls.

18 So, okay, very good. Well, I'll see y'all at  
19 2:30.

20 MS. NAYDONOV: Thank you, your Honor.

21 MR. HOWEN: Thank you.

22 (Recess, 9:55 a.m. to 2:26 p.m.)

23 (Open court, all parties present.)

24 THE COURT: Please be seated.

25 We're back here in 4:19-cv-358, a continuation of

1 our discussion today by telephone.

2 Let me ask just a couple questions and make sure.  
3 We've had a lot of discussion on MILs 6 and 7. What  
4 specifically -- make sure I understand what the defense is  
5 seeking this third-party evidence is for. What is the  
6 specific purpose? Make sure I'm on the right page for what  
7 the purpose is.

8 MS. NAYDONOV: Thank you, your Honor.

9 THE COURT: And I have to say you used a lot of  
10 time this -- and I'm not complaining, but I was wondering.  
11 You talked continuously without a breath today, so that was  
12 impressive. I don't --

13 MS. NAYDONOV: I will try to be a lot more  
14 concise, your Honor.

15 THE COURT: No, no, no. It wasn't that. It was  
16 just that I made a comment to my law clerk, did she take a  
17 breath, you know, so -- it's impressive you could do that  
18 but --

19 MS. NAYDONOV: I do breathe. I can represent  
20 that.

21 THE COURT: No, I know. I'm not -- I'm not giving  
22 you grief. It was a compliment so --

23 MS. NAYDONOV: So, your Honor, in terms of the  
24 third-party evidence, your Honor has already acknowledged  
25 in prior rulings on multiple occasions that this evidence

1 is critical and core for defendants' case in terms of  
2 proving whether Gibson's alleged trademarks are generic.

3                   Third-party evidence is what the courts and the  
4 Trademark Trial and Appeal Board routinely rely on to  
5 ascertain whether people perceive a shape or a mark as a  
6 brand name, a source identifier, or whether it's generic.

7 So --

8                   THE COURT: So are you seeking to offer this on  
9 genericness for purposes of disproving infringement or for  
10 your cancelation claim?

11                  MS. NAYDONOV: Both, your Honor.

12                  Under Fifth Circuit law, one of the factors in the  
13 likelihood of confusion standard is the strength of the  
14 asserted mark. Here we're contending because there have  
15 been, by the admission of their own music history expert,  
16 over 50 third-party uses of each of the shapes over many  
17 years, the alleged shapes are, if not unprotectible, very  
18 weak. So there is no likelihood of confusion because  
19 people do not associate them with one source or they will  
20 look at the brand name on the headstock and distinguish  
21 them.

22                  But that evidence is also critical for our  
23 cancelation counterclaims to cancel their trademark  
24 registrations as generic.

25                  And if I may approach, your Honor, here is a

1 representative example of what defendants would like to  
2 offer during their opening statement and later on at trial,  
3 which is just a sampling -- not everything but just for the  
4 two shapes at issue, the V shape and the ES-335 shape --  
5 just a sampling of all the third parties that have been out  
6 there making the exact same or very similar shapes over  
7 many years. This is exactly what the Court in the Fifth  
8 Circuit and other jurisdictions have used to decide whether  
9 the shape is generic.

10 Now, if the requested ruling is maintained that  
11 only third-party evidence after '92 can come in, the jury  
12 essentially will be deprived of this critical, core  
13 evidence of what was going on in the '70s, '80s, and early  
14 '90s of all these scores of third parties being out there  
15 and weakening and basically showing that the mark -- the  
16 alleged marks are generic.

17 And also plaintiffs admittedly want to rely on  
18 1958 as the first use date of the Flying V shape and the  
19 Explorer shape. So if the jury doesn't see all the third  
20 parties that were there in the '70s, '80s, '90s, they will  
21 be deceived into believing that in '58 Gibson comes out  
22 with the Flying V shape and they would think there are no  
23 third parties and then third parties start to come along in  
24 the '90s and, you know -- but they will be deceived and  
25 they will not see that actually since the '60s, right after

1 Gibson introduced this shape, there were scores of third  
2 parties who have used the same shapes.

3 So they have been weak and generic for decades,  
4 which is why we request that your Honor allow us to  
5 introduce third-party evidence dating all the way back to  
6 when they asserted they started using these shapes, so the  
7 jury has an accurate and not a twisted picture of the  
8 United States' marketplace. So this is our position on the  
9 third-party evidence.

10 And for reasons that we mentioned this morning,  
11 your Honor, we believe that the five-year look-back rule  
12 does not apply, first of all, because --

13 THE COURT: And I will tell you. It wasn't -- I  
14 wasn't really adopting -- the plaintiff suggested the  
15 five-year. I don't necessarily -- I don't necessarily  
16 agree that when I issue my decision that it's necessarily a  
17 five-year rule. I wasn't creating a rule. It's more of I  
18 have to draw the line somewhere, and where is the point  
19 where it becomes too confusing to the jury and highly  
20 prejudicial.

21 So I wasn't trying to adopt the five-year rule, to  
22 make that clear; but I felt like a line had to be drawn  
23 somewhere. So just -- I wanted you to understand that I  
24 wasn't trying to adopt any kind of bright-line rule on that  
25 but --

1 MS. NAYDONOV: Thank you, your Honor.

2 So we believe that a line should be drawn from  
3 basically when plaintiffs started using their shapes and  
4 assert that they can assert protectable marks. For  
5 example, in the case of Flying V in 1958, the jury -- they  
6 are going to stand up and tell the jury, "We've used this  
7 trademark since 1958 and it's famous and it has marketplace  
8 impact."

9 We should be allowed to simply respond that, no,  
10 there have been third parties starting in the '60s and '70s  
11 who have used the same shape and, therefore, it's weak and  
12 it's generic or at least if it's not generic, it's  
13 commercially weak and the scope of the rights in their mark  
14 is very narrow.

15 So we plan to be very efficient in how we  
16 introduce this evidence, as you can see with the summary  
17 representation here. We're not planning to inundate the  
18 jury. We'll stick to our trial time. But we believe the  
19 jury deserves to see all the third parties that have used  
20 the same shapes for all these decades.

21 And that's, as I mentioned, what the courts have  
22 done, the TTAB has done. For example, when the Fender  
23 Stratocaster shape was invalidated on genericness grounds  
24 in 2009, they looked back at the decades of third-party  
25 usage to find that the shape is not protectable.

1                   THE COURT: Okay. Thank you.

2                   Okay, response. And I'll say that -- I know you  
3 haven't had a chance to respond to what happened this  
4 afternoon (*sic*) and then -- again, I started with her  
5 because I had a couple more questions. But, you know, the  
6 goal of the Court is to try to get this right, and the  
7 question is did the Court not get it right when I issued my  
8 order on MILs 6 and 7 and -- you know, so I know we  
9 spent -- there's been a lot of paper on this issue and a  
10 lot of argument and, again, my goal is to get it right  
11 so -- I know you probably think I got it right but -- but  
12 I'm not so sure, so I leave that with you that --

13                  And, you know, I know that -- let me go back to my  
14 order on this issue about whether or not the mark was --  
15 or -- was dormant. And clearly that is a hotly contested  
16 issue, and I know we didn't spend a lot of time talking  
17 about that and maybe the terminology but -- but, okay, I'll  
18 leave it to you to go ahead and tell me what you want to  
19 tell me.

20                  MR. HOWEN: You got it right.

21                  THE COURT: I know you're going to say that but --  
22 but you're going to always say that because I ruled in what  
23 the plaintiff asked me to do so -- but that doesn't mean I  
24 got it right. It means I agreed with you initially.  
25 So the question is should I stay there.

1                   MR. HOWEN: So I'm going to attempt to tell you  
2 why you got it right.

3                   The way we read the order, first of all, is that  
4 it's a motion *in limine*. It is not evidentiary at that  
5 point. I understand, sympathize and, from prior personal  
6 experience, empathize with counsel. I think their problem  
7 here is that they obviously do not -- they want to use this  
8 stuff in opening statement and don't want to run afoul of  
9 the Court by putting up something that might or likely  
10 would not come in. And that's the -- that's why they  
11 responded saying, wait a minute, we need this before the  
12 trial starts.

13                  And in our response letter, we indicated that  
14 that, to me, turns this into a Rule 104 hearing. And what  
15 they're trying to say is we need a determination on the  
16 admissibility of evidence, this third-party use stuff,  
17 before the trial starts. And that's how we view this  
18 hearing is a Rule 104 hearing.

19                  And I think the rules almost perfectly fit for  
20 this sort of situation because as we read the opinion -- or  
21 the order, excuse me, it -- what it seemed to say, to us at  
22 least, was that that dormancy period was crucial to making  
23 a distinction between the Fifth Circuit case that you  
24 analyzed at the start and said, well, we're not really in  
25 that situation because we had this period of dormancy.

1                   And defendants have objected, saying, no, there  
2 was no period of dormancy.

3                   And so it seemed to us the crucial question here  
4 is was it dormant for some period of time, and the real  
5 issue here -- or they've tried to attack that factual  
6 premise in two ways. They have suggested that they bought  
7 a company that would have owned the rights, the actual  
8 trademark rights going forward, and that that would  
9 actually apply not only to the genericness argument but  
10 also to the laches argument, which are the two key defenses  
11 in the case.

12                  And then they say, "Well, if we didn't buy the  
13 company, then the use of the brand name by other people was  
14 continuous until we picked up the sword; and, therefore,  
15 based on that continuous use from 1977 to 1997, we can tack  
16 back all the way back to when Dean Zelinsky started making  
17 guitars."

18                  And so we're going to try and address those two  
19 key issues here.

20                  But we would also point out that our understanding  
21 of this is that you did exactly what you -- or you would  
22 intend exactly what you said in your order, which is the  
23 ruling is limited to advertising and sales. That was the  
24 basis of the motion *in limine*.

25                  We did not move, and we do not understand the

1 Court's order, to prevent either party from explaining the  
2 history of their companies and their brands. And so the  
3 idea -- at the end of counsel's argument this morning, she  
4 indicated, "Well, we couldn't even say that Dean Zelinsky,  
5 you know, first came up with these models and tell that  
6 story." And we don't see that in the Court's order. I  
7 don't know if -- if that helps them at all, but we  
8 certainly didn't intend that.

9 I think the Court was pretty specific that what  
10 you would be barring would be third-party advertising and  
11 sales from 1992 forward and the same thing for Dean itself  
12 from 1997 backwards.

13 And, frankly, as far as I can tell, there is not  
14 hardly any, if any, evidence on sales during that time  
15 period. What we're talking about are hundreds of these  
16 catalogs and advertisements. That's the exhibits that the  
17 Court's order would touch.

18 So starting there, the question is did it become  
19 dormant; and the first thing I'm going to address is this  
20 idea that they potentially could have purchased a company.  
21 And to do that, we're going to look at the history of the  
22 Dean brand, which is the guitars Armadillo sells. And all  
23 of this comes -- all the evidence that supports this is in  
24 the binder that the Court has and counsel has here, and we  
25 think -- while there's always some discovery-type issues in

1 depositions, we think this is fairly clear.

2                   1976-1977 near Chicago, Illinois, a teenager at  
3 the time by the name of Dean Zelinsky began the boutique  
4 manufacture of American guitars. They're made in the USA.  
5 He was not a large company, as one might expect for  
6 somebody who is 18 or 19 years old starting a company. It  
7 is actually very impressive that he was able to pull this  
8 off. And he used the Flying V and Explorer body shapes.  
9 We would contend and do contend that he used two of the  
10 four body shapes that are at issue in this case. That  
11 company that he started was incorporated as Dean Guitars,  
12 Inc.; and in Tab A is all the testimony that would support  
13 that.

14                  In 1985 he either by choice or had to change his  
15 focus. And what happened there is instead of manufacturing  
16 the guitars in the United States, he went to an import  
17 model. And as the result of that, he said he had to get a  
18 new financing structure. And in part of his refinancing,  
19 that required a change of corporate entities and he left  
20 Dean Guitars, Inc., and he started Guitars, Inc., although  
21 the guitars were still sold as Dean guitars. So that's  
22 what happened in 1985.

23                  Whether business losses, desire to do something  
24 else -- I'm not going to impute motives -- in 1991 Dean  
25 Zelinsky clearly ceased operations in terms of building or

1 selling guitars. When he did this changeover, he had  
2 previously assigned some of the assets of Dean Guitars,  
3 Inc., the original company, to creditors; and he was  
4 shutting down. And what he was left with was this name,  
5 and people -- there are some people that liked Dean  
6 guitars, had an affinity for them; and so he sold that  
7 name, the brand name, along with logo rights, to a man  
8 named Oscar Mederos.

9 Now, Oscar Mederos, we have -- in Tab B we have  
10 his whole declaration. Oscar Mederos was and, importantly  
11 later in the argument, still is the president of a company  
12 called -- that goes by Tropical Music, Inc.

13 In paragraph 11, which is the second paragraph,  
14 Mr. Mederos describes his business model; and that said  
15 (as read): "Tropical Music conducts 95 percent of its  
16 sales outside of the United States and has done so from  
17 approximately 1985 to the present. This declaration was  
18 given in the course of discovery in the lawsuit." So I  
19 would say the "present" there is still the present.

20 What that says is that all of its business -- he  
21 sells many instruments, basically to the Caribbean market.  
22 That's where Tropical Music does business.

23 And he tells the Court -- now, he is the person  
24 and that is the company that had the Dean brand name from  
25 1991 to 1997. And he tells the Court (as read): "Other

1 than the documents labeled Tropical 1 through 7, I do not  
2 recall which Dean model guitars Tropical Music sold,  
3 offered, advertised, marketed, distributed, or promoted  
4 while owning Dean Guitars."

5 And so he would have the most knowledge of what  
6 was going on with Dean Guitars between 1991 to 1997, and he  
7 has given us seven pieces of paper and says that's what I  
8 remember about that.

9 Moving forward, in 1997 Armadillo -- excuse me --  
10 Concordia -- so there's two defendants here, Armadillo and  
11 Concordia. Concordia is the holding company for the  
12 intellectual property rights. That's who owns whatever  
13 trademarks or names they are using. And then it licensed  
14 them to Armadillo, who actually manufactures and sells the  
15 guitars; and the license agreement allows, for instance,  
16 the Dean name or logo to be put on an Armadillo Dean  
17 guitar. And so Concordia acquired Dean in 19- -- the Dean  
18 name in 1997.

19 Now, currently Evan Rubinson is the CEO and  
20 president of both Armadillo and Concordia. He is the son  
21 of Elliott Rubinson, who until recently was the president  
22 and CEO of both of those companies. Unfortunately,  
23 Mr. Elliott Rubinson passed away from cancer not too long  
24 ago.

25 But the question is when these companies acquired

1 the rights from Dean, what was the status of that Dean  
2 brand or mark? And Mr. Elliott Rubinson repeatedly -- we  
3 have four examples, and those are just the ones we  
4 selected -- repeatedly, at trade shows and in promotion of  
5 this new venture of his, spoke about the history, the exact  
6 thing that we're talking about in court today.

7 And this is a clip from -- in which Mr. Rubinson  
8 explains that history.

9 (Audiovisual presentation to the Court.)

10 MR. HOWEN: So that was a little loud; and the  
11 actual transcript of that is in Tab C of your folder, as is  
12 the transcript of the other three times he makes almost  
13 exactly the similar statement.

14 So, to be honest, your Honor, I'm a little taken  
15 aback when we get accused of twisting and misrepresenting  
16 the facts by saying that we're contending that this thing  
17 was dormant when they got it when their own founder, the  
18 person who completed the purchase, said it was dormant, it  
19 was dead, it was 10 feet underground. That is his  
20 description of the status of the Dean mark and business  
21 when these defendants acquired it. So that seems to --  
22 that carries weight with us.

23 There was some -- in the recent briefing there was  
24 some indication that, well, gee, Mr. Rubinson didn't say  
25 that under oath. And if you turn to Tab D -- this isn't

1 exactly on point. But when he's getting this company up  
2 and going, this Armadillo and Concordia, when he's getting  
3 it up and going --

4 And a little backtracking. Elliott Rubinson had  
5 been, until right before this, one of the largest  
6 distributors of Gibson guitars in the southeast. And so  
7 he's going from selling -- and he sold other guitars. He  
8 sold Dean guitars. He sold a lot of guitars and other  
9 musical instruments; but, as I said, he sold a lot of  
10 Gibson guitars. And so he's going from a retail or  
11 wholesale sort of operation to an actual manufacturer,  
12 getting on the other side of the business.

13 And, of course, getting all of that stuff up and  
14 running and he's going to do it with the Dean guitars, he's  
15 trying to bring in all of the Dean marks that he can. And  
16 one of those was a headstock registration that they had a  
17 mark on a headstock. And Tab D demonstrates that in 1998,  
18 that's when that asset came into the company.

19 The next exhibit, Exhibit E -- and I'm not sure we  
20 got the right one in the book. I'm sorry. We will get  
21 that to -- oh, I'm sorry. It's just the first page is  
22 redundant. You have to start on the second page of  
23 Exhibit E. That's the trademark license agreement. That  
24 is the agreement through which Armadillo can sell guitars  
25 with the Dean marks on them. And the important thing for

1 today's purposes is that license agreement came into being  
2 on July 1st, 1997.

3                   In summary judgment declarations in this case, the  
4 current CEO, Mr. Evan Robinson, dated -- and if we go to  
5 Tab F, paragraph 17, he says (as read): "From at least  
6 1997 to the present Armadillo has displayed and promoted  
7 the Dean V and Z guitars at the annual NAMM show and  
8 numerous other events and in connection with many different  
9 artists."

10                  He told the Court through that that's when  
11 they started promoting these guitars, in 1997.

12                  And, finally, in the contention interrogatories we  
13 sent them, their answer was that Armadillo started selling  
14 these guitars -- first use by -- I shouldn't say sale --  
15 1995, 1995, there's four shapes that are at issue on  
16 genericness and cancelation, 2012, and 2010.

17                  So it's clear that Armadillo, the defendant in  
18 this case, the corporate entity that's in this case, only  
19 began using this mark in the late 1990s. I don't see how  
20 anybody could look at that any other way.

21                  The suggestion that, hey, we're actually -- that's  
22 when we started using it as a company but we did it by  
23 buying another company, which is the insinuation that has  
24 been made, can be easily answered by asking this question:  
25 What company did they buy?

1           They never had any direct dealings in purchasing  
2 anything from Dean Zelinsky. It turns out in 2000 he came  
3 and worked for them as a consultant for a while, but they  
4 never bought anything directly from Dean Zelinsky.

5           The only company that they dealt with was this --  
6 Oscar Mederos' company, Tropical Music; and as Tab H  
7 demonstrates, Tropical Music is still its own company run  
8 by Oscar Mederos. That's the Florida Secretary of State  
9 yesterday's informational listing on it.

10           So this discussion and, actually, accusation  
11 against us that we are somehow twisting facts by saying  
12 that they didn't buy a company -- they clearly did not buy  
13 a company. They bought the name, the mark. They didn't  
14 buy any of the shapes because we own the shapes. They just  
15 bought the name and mark.

16           And so I don't think, from a corporate entity "we  
17 own it" standpoint, they can claim anything other than  
18 exactly what Elliott Rubinson said four times at least  
19 over, is he revived a dead brand starting in 1997. That's  
20 his testimony.

21           Their alternative argument is, well, actually, we  
22 can because the Dean brand itself, whether it was owned by  
23 us or Oscar Mederos or Dean Zelinsky's companies, stayed in  
24 continuous use going forward.

25           And we've provided one case that's attached there.

1 It's an *Exxon* case from the Fifth Circuit in 1983. And  
2 what we provide it for is to give some context to exactly  
3 what "dormant" might mean. And what the case stands for is  
4 the idea -- that was a -- there was -- as the Court  
5 probably is aware, *Exxon* used to be *Humble*; and later in  
6 their conglomeration they adopted the *Exxon* brand name.  
7 But they wanted to keep *Humble* as something they could  
8 potentially use, and so they -- what they did was they  
9 tried to do limited sales of *Humble*-branded products over  
10 time.

11 And the Fifth Circuit said, one, and to be candid  
12 with the Court, when you're doing it for that purpose, that  
13 sort of defeats the idea of actually putting it in commerce  
14 but, two, you're hardly doing anything and just having  
15 these small random events isn't enough to not abandon the  
16 mark.

17 And so in terms of the Court's analysis, I think  
18 the question here was, well, was there an abandonment, not  
19 an intentional abandonment but an effective abandonment,  
20 between 1991 and 1997. And in response to that, that was  
21 the evidence that was part of their PowerPoint this  
22 morning; and that was the purpose of here's these catalogs  
23 from this time period.

24 And so what we did was try to look at those --  
25 that evidence and put it in context of this case to see is

1 this really the brand had been kept going in the United  
2 States from 1991 to 1997, or what is the strength of that  
3 evidence to show -- we know it wasn't a company, but what  
4 is the strength of the evidence to show what sort of brand  
5 presence they had in 1997, given what they showed you on  
6 the PowerPoint.

7                   Mr. Schuettlinger is the one that took the laboring  
8 oar in that because we only had a couple hours after  
9 looking at their PowerPoint; so if you don't mind, I'd like  
10 to turn it over to him to explain that.

11                  THE COURT: Go ahead.

12                  MR. SCHUETTINGER: Good afternoon, your Honor.

13                  THE COURT: Good afternoon.

14                  MR. SCHUETTINGER: We haven't met before. I've  
15 talked to you on the phone in teleconferences, but I'm  
16 Mr. Schuettlinger.

17                  THE COURT: Welcome.

18                  MR. SCHUETTINGER: So you had asked opposing  
19 counsel today was there any time frame that the mark went  
20 dormant, and my colleague was saying about the history of  
21 the entities.

22                  And so we know from the deps around 1988, Dean  
23 Zelinsky's U.S.-based company -- he had stopped the  
24 factory, closed it down. He assigned all his U.S. assets  
25 to his creditors, and he starts a new entity. That entity

1 has no corporate office in the U.S. He was only importing  
2 guitars made overseas and selling them.

3 And so the question becomes from 1988 when this  
4 factory closes and to when he eventually just assigns the  
5 trademark to Tropical, who was primarily an exporter,  
6 what's going on in the U.S.? What do consumers see?

7 And so we looked at their evidence in this case  
8 because their argument this morning was this is a highly  
9 contested issue, let's give it to the jury. And we looked  
10 at their exhibit list; and they have on the exhibit list  
11 almost 4,000 documents. It's 3,958 exhibits.

12 And so I went and I typed "Dean" to figure out how  
13 many exhibits say "Dean" on them. And of the approximately  
14 4,000, 967 mention Dean. So I looked through all of them.

15 And when we look at advertising, page 180 of their  
16 exhibit list shows that they can present to a jury a Dean  
17 price list from 1988. So this is the time when Dean  
18 Zelinsky is closing his factory, but he's made a price list  
19 for that year.

20 And then the next ad they can show, or purport to  
21 show to the jury, is a 1993 Dean ad. So we have a  
22 five-year gap in activity.

23 Then the next advertising -- or evidence I could  
24 find is 100 pages later, on page 288; and there they have  
25 what purport to be Budweiser guitars. And I deposed

1 Mr. Zelinsky about these, and he said he made some  
2 promotional guitars for Budweiser the company and this was  
3 around the time his factory is closed and this was kind of  
4 his last big sale.

5 And so we have 1988 we have one price guide that  
6 they can show the jury. In '89 they have a promotional  
7 guitar that they can show the jury, to Budweiser.

8 Then we go to Tropical. Here, Tropical has now  
9 bought the company; and he says, in paragraph 7 (as read):  
10 "Tropical Exhibit 1 is a true and correct copy of an  
11 advertisement from 1992." So we've gone now from 1989 to  
12 '92, three years. And he says (as read): "The ad was  
13 created by Heartland Group, which distributed the Dean  
14 model depicted in the United States after purchasing from  
15 Tropical Music during the time Tropical Music owned Dean."

16 Next he says (as read): "Tropical 2 is an  
17 advertisement created by Barnes & Mullins who distributed  
18 the Dean model depicted in the U.K. after purchasing from  
19 Tropical Music."

20 So he's pointed to two pieces of evidence. One he  
21 says was a U.S. entity; the other he says was a U.K.  
22 distribution.

23 And this is what they showed the Court today  
24 during the hearing as their evidence of never being  
25 dormant, and this is Tropical 1. And if you look, it's

1 clearly an advertising mockup. It's not an ad that anyone  
2 here or any witness could tell you what magazine this  
3 appeared in in the United States, where it was distributed  
4 in the United States. It still has, on the bottom left,  
5 the Dean ad along with the color and margins; and at the  
6 bottom right, it just says it was printed in 1992.

7 And so what we see here is from 1989 to 1992, they  
8 are going to be able to present to the jury this mockup.  
9 And if the shoe was on the other foot and we were here on  
10 an infringement case in 1993 and I had 4,000 exhibits and  
11 your Honor said, "Well, what's your evidence in 1990 that  
12 they sold a Dean product, what's your evidence in 1991 they  
13 sold a Dean product, what's your evidence in 1992 they sold  
14 a Dean product" and I said, "Your Honor, look at this  
15 printout. This is what I'm going to present to the jury,"  
16 I don't have any evidence of use in commerce in the United  
17 States, right?

18 And so this is the second piece of evidence that  
19 Tropical pointed to in their deck, and here you can clearly  
20 see that this ad says it's (as read): "East of Eden and  
21 All Over Great Britain." And if you look at the bottom, it  
22 says (as read): "Dean Guitars exclusive U.K. distribution  
23 via Barnes." So this is clearly an ad that was provided  
24 overseas, not to U.S. consumers.

25 And this is what you would think. When you look

1 at their exhibit list, 1990-'91, zero exhibits out of  
2 nearly 4,000 that they are going to present to the jury.

3 From 1992 they have one mockup ad that they are  
4 going to present to the jury, with no witness who can  
5 testify that that ad the jury is going to see consumers  
6 ever saw in the U.S.

7 And then they showed the Court in the hearing this  
8 morning three undated catalogs -- but when you look at the  
9 catalog itself, there is no way of knowing the date that  
10 that was made and they don't have a witness to testify was  
11 that catalog distributed -- and a 1996 price list.

12 And so when you look at this activity, what does  
13 it show? Well, it shows their owner, Elliott Rubinson, was  
14 being honest. He bought a dormant company. This is all  
15 activity you would think a dormant company would do.

16 And if you look at their exhibit list, they were  
17 able to pull most of their exhibits, or very old catalogs,  
18 from third parties that they were able to find. They hired  
19 an expert to use things like Wayback and Ventex (phonetic  
20 spelling) to find all sorts of ads from the '70s and '80s  
21 related to third-party distributors --

22 THE COURT: Would you mind putting it on your --

23 MR. SCHUETTINGER: Put it up here?

24 THE COURT: Just put it on your lapel so it will  
25 be easier because you're like me. You talk with your hands

1 so --

2 MR. SCHUETTINGER: Is this better?

3 THE COURT: That will be good. Thank you.

4 MR. SCHUETTINGER: Okay. So they were able to  
5 find all these ads for third parties to show their use, but  
6 they can't provide any evidence for two years. They can  
7 provide one mockup for another year, and they can provide  
8 other catalogs for 1993 and '94 that they say are from  
9 those years but no witness to say whether they were  
10 distributed in the United States.

11 And so this is evidence of dormant. And if you  
12 want to draw a line, I think our brief and your ruling show  
13 this is a proper line. They were not around. We couldn't  
14 have sued anyone in 1990. We couldn't have sued anyone in  
15 1991. 1992, if anyone wanted to sue them for using the  
16 Dean mark, they don't have any use in commerce; they have a  
17 mockup ad.

18 And so I think that addresses your point.

19 And this is what I'm mentioning here. This is  
20 what they showed the Court. They say this ad is from 1993.  
21 There is no way of knowing when this ad is from. They  
22 don't have a witness that can say when this ad is from; and  
23 this ad isn't a self-authenticating publication where I can  
24 see the cover of the magazine to prove when it was  
25 published, where it was distributed.

1           Here is the ad from 2003. This is a catalog -- or  
2 1993. If you look at the bottom, underneath the image, you  
3 can barely see it but it says "1993 catalog." Here again  
4 this isn't a publication in distribution, i.e., a  
5 guitar.com magazine where I can tell your Honor, "Well,  
6 this is distributed throughout the United States." So  
7 there is no way of knowing where this ad was distributed,  
8 if it was.

9           And so the next thing that we see that on its face  
10 you know what it is is a 1996 retail price list where at  
11 the bottom left it says, "Effective Date January 1st,  
12 1996," which is in line with Elliott Rubinson's testimony  
13 and what we think the evidence will show, that around  
14 1996-'97 he's trying to revive the brand and here is a  
15 price list. It's the first price list we see in this case  
16 on their evidence list since 1988.

17           Here again is another thing they presented this  
18 morning to show continued use. There is no evidence on  
19 here of knowing when this was made, produced, or if it was  
20 distributed in the United States.

21           And so based upon that, we think we've shown that  
22 it clearly was dormant, at least for a period of three to  
23 four years.

24           MR. HOWEN: And, your Honor, just to wrap up the  
25 presentation, I think that the Court, both in the ruling

1 and in the questioning of counsel earlier, got it right,  
2 which is that what you're trying to do and what you should  
3 do is to gauge what the marketplace looked like when the  
4 defendants entered the marketplace. That's the *Boston Duck*  
5 case that we cited to you.

6 Add to that, just for clarity's sake, the  
7 trademarks at issue in this case were not issued until  
8 1996, the first one, two in '97 and one in 1999.

9 So we've got -- they want to talk about a Fender  
10 guitar back in 1968 -- and I'll segue to *Fender* for a  
11 moment. They keep saying that it was invalidated. That's  
12 incorrect. In the *Fender* case it was never issued, the  
13 registration for the Stratocaster.

14 But the point being they want the jury to see  
15 these ads from 1968, ads or catalogs from third-party uses,  
16 which was 30 years in that instance, or 29 years, before  
17 they entered the market and 29 years before the trademark  
18 was issued on it.

19 And so I do think, when the Judge says I need to  
20 draw a relevance line somewhere to get control of these  
21 4,000 exhibits and figure out what really matters to the  
22 jury, that a timeline is appropriate. And given that, hey,  
23 they entered the market in 1997, I think that's more than  
24 appropriate.

25 And I would point out what that demonstrates is

1 we're 25 years from then, right? And really what the jury  
2 would probably be deciding is are they generic today, are  
3 our shapes generic today.

4 We're asking for damages back to 2011 because  
5 that's the first date that anybody can provide sales  
6 information, either them or us; and we're asking for an  
7 injunction going forward. And so I know the trademark  
8 lawyers are scribbling all about what I just said. But the  
9 jury, in a commonsense approach, that's what they're being  
10 asked is, hey, are they generic today; and, frankly, your  
11 Honor, they would have 25 years of evidence to show that  
12 they are or are not generic today.

13 And in our briefing on the letter in response to  
14 what they sent, we took their opening statement exhibit  
15 list and said out of the 367 exhibits, what would the  
16 Court's motion *in limine* exclude from that and highlighted  
17 them in orange and then what would it allow, as long as  
18 they were independently admissible of the Court's ruling,  
19 and highlighted them in green; and then we said what falls  
20 into the middle, in the period that you're talking about,  
21 and highlighted those in yellow. There were a couple in  
22 pink where we couldn't figure out a date.

23 The result of that was it was the majority green.  
24 This ruling wasn't keeping those things out. We might have  
25 other evidence objections to them, but it wasn't -- the

1 motion in limine ruling was not saying those things would  
2 be precluded.

3                   And the pattern, I think, is startling because it  
4 tracks exactly what the Court's perception was, which was,  
5 yes, there was a lot of activity in the -- leading up to  
6 this. But as we see it, Gibson took control of the market;  
7 and they don't have much evidence in the '90s that there  
8 was a lot of competition. Those are the few yellow  
9 entries.

10                  And then you've got all of these Dean stuff from  
11 1997 forward, and that would be admissible under the  
12 Court's ruling. That's stuff that is not being kept out.

13                  And so in terms of management of this trial, I  
14 think that's important; but most importantly, the jury  
15 should not be confused that we can't have a valid mark  
16 because somebody 30 or 40 years ago used a guitar that  
17 looks somewhat like ours.

18                  And, of course, all of this is conditioned on we  
19 don't think the guitars they are showing in the third-party  
20 use are actually infringing on our guitars and, therefore,  
21 they're wrong to say that even if it did come in.

22                  But the amount of time and effort it takes to say,  
23 wait a minute, this guitar from 1972 made by manufacturer X  
24 that they contend looks like an SG model guitar, now we're  
25 going to have to demonstrate to the jury where the

1 difference in the shape in that guitar is; and then we're  
2 going to have to demonstrate the next of their 4,000  
3 exhibits and then the next of their 4,000 exhibits and then  
4 the next of their 4,000 exhibits. And we don't want to  
5 just be swamped by volume when we've got an answer to all  
6 of those things but we only have 25 hours now to present  
7 it.

8 And so for all of those reasons, we think  
9 practically and legally the order should stand on that  
10 motion *in limine*. I know you indicated you might talk  
11 about the others, but that's sort of our point there.

12 MS. NAYDONOV: May I respond?

13 THE COURT: Yes, go ahead and respond.

14 MS. NAYDONOV: Thank you, your Honor.

15 May I approach to provide a copy?

16 THE COURT: Yes.

17 MS. NAYDONOV: That's from this morning.

18 Your Honor, this is not a summary judgment ruling  
19 and this is not a bench trial. Gibson requested a jury  
20 trial. They got it. And our clients deserve a day in  
21 court to argue their side of the story.

22 They just spent about an hour basically doing an  
23 opening statement that they should be doing to the jury on  
24 Monday. They asked you to weigh the evidence. "This  
25 evidence we interpreted that way, this evidence should be

1 accorded this weight, this evidence is not persuasive,"  
2 according to them.

3           But this is what the jury has to decide in this  
4 case. Actually, the question -- one of the questions aside  
5 from the infringement is is the action barred by laches  
6 because they waited too long to sue. That is the question  
7 for the jury. We contend they waited too long because we  
8 came to the market in 1977, and we have all this evidence  
9 demonstrating continuity.

10           We moved for summary judgment on laches, your  
11 Honor, and they argued that there are fact issues  
12 precluding summary judgment and your Honor agreed and  
13 denied summary judgment and said there are factual issues  
14 precisely over all these things. They spent, like, over an  
15 hour describing and attaching hundreds of pages of evidence  
16 and trying to weigh it before your Honor. The jury should  
17 be weighing it.

18           So it's a hotly contested factual issue as to  
19 whether the company was dormant. They clearly believe it  
20 is; we clearly believe it does not.

21           And summary judgment was already denied because  
22 your Honor very correctly found that there are factual  
23 issues that need to go to the jury. Under the Lanham Act  
24 abandonment takes place if there is no use for three years  
25 with no intent to resume use. They cannot show that,

1 especially the no intent to resume use.

2                   But also the key question is there is this whole  
3 sideshow about the continuity of the Dean mark. They are  
4 not suing us -- or we're not suing them over the Dean word  
5 mark or logo. The question is can we tag back to 1977 for  
6 use of the guitar shapes that are not marks at all? We  
7 contend that they are generic.

8                   And a lot of statements were made that I would  
9 like to just briefly address about the history of the  
10 company. Dean came to the market in 1977 by a 19-year-old  
11 gentleman, Dean Zelinsky, who quickly became very famous,  
12 one of the most prominent guitar brands in the United  
13 States. As I mentioned this morning, Cars, Doobie  
14 Brothers, ZZ Top playing their guitars. Gibson, no  
15 question, knew about us.

16                   We completely disagree that, you know, he went out  
17 of business and didn't do anything starting in 1986. He  
18 testified that he continued to sell guitars up until 1991.  
19 Then he sold the brand to Tropical Music, and that's where  
20 the declaration comes in from Tropical Music. They only  
21 showed your Honor parts of that declaration, but the  
22 declaration makes very clear -- and by the way, they  
23 stipulated that this declaration is admissible at trial,  
24 admissible at trial instead of testimony from Oscar  
25 Mederos.

1           But it clearly says that Tropical Music had  
2 manufactured and then distributed during the time Tropical  
3 Music owned Dean Guitars. Some of the guitars bearing the  
4 Dean mark were assembled in Florida. Some were made from  
5 scratch in Florida during this time. Some of those guitars  
6 were sold and distributed in the United States.

7           It also says that Tropical Music -- at  
8 paragraph 12 -- entered into -- with Washburn -- into a  
9 license that permitted Washburn to use the Dean word mark  
10 and Dean logo in the U.S. in connection with Dimebag  
11 Darrell products.

12           Use by a licensee inures to the benefit of the  
13 licensor.

14           Paragraph 7, attaching a copy of the 1992 ad.

15           Attaching also, as you can see, your Honor,  
16 pictures at page 6, 7, 8, 9, 10 of actual guitars bearing  
17 the Dean brand that are being sold in the United States.  
18 They simply cannot show abandonment because Dean brand  
19 continued to exist and was being sold.

20           And they spent, you know, half an hour nitpicking  
21 at various catalogs and, you know, copies of that saying  
22 "We think it's not persuasive" or "You cannot show exactly  
23 where they were distributed." We have witnesses who will  
24 testify about those ads being used in the U.S., products  
25 being sold in the U.S.; and this is exactly the question

1 for the jury to decide.

2 And I find it ironic that the first slide of their  
3 presentation is "Dormant?" It's a big question indeed.  
4 It's a big factual question that the jury deserves to  
5 decide, and we deserve our day in court.

6 So that's on the first issue of whether there was  
7 dormancy or continuity, factual issue. Completely  
8 different, in our opinion, your Honor, from the third-party  
9 uses.

10 The third-party uses -- they want to tell the  
11 jury, "We started using these shapes in the '50s and we own  
12 exclusive trademark rights, common-law rights, since then  
13 all up until now."

14 The jury, for genericness purposes, deserves to  
15 see what the marketplace looked like in the '70s, '80s,  
16 '90s. So irrespective of whether we came along in '77 --  
17 we did -- or in the '90s, the jury deserves to see the full  
18 picture. They are trying to blind the jury, shut their  
19 ears, and have this distorted picture of the marketplace as  
20 if there was nobody in the '60s, '70s, and '80s, it was  
21 just them. No, not true. There were --

22 And counsel is correct, yeah, there are thousands  
23 and thousands of pages of third-party evidence just because  
24 they didn't police those shapes. That is the definition of  
25 when something is generic. They are overwhelmed by this

1 evidence because there is just so many third-party uses out  
2 there, but that is sort of the problem of their own doing  
3 for not policing their brands for all these decades.

4 And as I mentioned, we will present the evidence  
5 very concisely to the jury in the form of summary charts,  
6 concise testimony; and we will stick to the 25 hours to  
7 present our case as your Honor has allowed us to. And they  
8 cannot cite a single case where the Court held that you  
9 have to cut off, for evaluating genericness purposes, what  
10 was going on in the marketplace, especially during the time  
11 that they contend they were using their marks.

12 They are essentially saying, "We started using the  
13 marks in the '50s, but you are not allowed to know what  
14 everybody else was doing for the next 30 years." There  
15 were a bunch of other companies using the same shapes for  
16 the next 30, 40 years. It's just -- it will deceive the  
17 jury.

18 So we view the third-party completely different  
19 from the dormancy and ultimately the jury just deserves to  
20 see all this evidence and make the ultimate conclusion as  
21 to laches, as to infringement, and as to genericness and  
22 it's improper to preclude the jury from viewing this  
23 evidence.

24 Thank you, your Honor.

25 MR. HOWEN: I'll try to be concise, your Honor. I

1 guess I went too long earlier.

2 The first point she made, as I recall it, related  
3 to laches, after we talked about generic for a long time.  
4 And I didn't address laches because -- but I'll connect it  
5 to the point where we didn't hear anything on response --  
6 or reply or rebuttal or whatever we're going to call it --  
7 about did they purchase a company. And that's I think  
8 because it's clear, I hope now, that they did not purchase  
9 a company. And why that is important to laches is they  
10 said, "Hey, you didn't sue back in 1977." That's not the  
11 laches question. It's "You didn't sue us back in 1977,"  
12 because the whole concept of laches is that it's unfair to  
13 the defendant to bring the case now.

14 Well, because they didn't purchase a company,  
15 there is no way possible that Gibson Guitar Corp. could  
16 have sued Armadillo in 1977, one, because the evidence  
17 would show Armadillo didn't even exist in 1977; and, two,  
18 Armadillo was not selling any guitars and they certainly  
19 were not selling any guitars that infringed on Gibson's  
20 trademarks in 1977. So this whole "it would hurt us on the  
21 laches" argument, I fail to comprehend.

22 Second, we get the assertion that the jury has to  
23 understand what the marketplace was in the '60s and '70s as  
24 they sit in that jury box in 2022, again 30 years before  
25 the trademarks were issued, 30 years before they entered

1 the market. I fail to see what the relevance of that is.  
2 And even if it is relevant, slightly relevant, that's a  
3 straight 403 finding because, as we pointed out, it's easy  
4 to put up a thumbnail image and say, "Our expert says that  
5 guitar looked like your guitar and there's a hundred of  
6 them."

7 Well, as I pointed out, we're going to have to  
8 rebut each of those hundred guitars to say, "Let's blow  
9 that up. Let's pick this guitar up and you'll see that  
10 this part of the design is completely different, that yes  
11 they both are -- they are both double cutaways" -- which is  
12 a term you will be hearing -- "but the depth, the shapes  
13 are not the same even though they are both double  
14 cutaways."

15 And we have to do that hundreds of times for  
16 guitars that are no longer sold, might have been licensed  
17 by us to allow somebody to do that, all because the jury  
18 deserves to understand what the marketplace looked like in  
19 1972, 50 years ago. And I just fail to see how that is  
20 relevant. But, again, if it is relevant, it creates a  
21 tremendous burden on us in a two-week trial; and it would  
22 create a burden in a month trial or a two-month trial. And  
23 just the bald assertion that it's relevant, I don't get.

24 And so, again, for all of those reasons, we think  
25 the Judge appropriately -- the Court appropriately drew a

1 timeline that gives -- again, there's plenty of evidence  
2 that's coming in under that ruling. Just look at our  
3 chart. That's just their -- what they wanted to show in  
4 opening. They've got much more beyond that. And so  
5 there's hundreds of exhibits that we're going to have to do  
6 what I just explained to do, but those are exhibits that  
7 are closer in time to when they were in the market and we  
8 had a trademark registration issued for us. So that makes  
9 more sense, I think, to do that.

10 And, finally, this idea that we're trying to get a  
11 summary judgment or conduct a bench trial. That's why I  
12 started with the Rule 104 analysis. Under Rule 104 when  
13 you have questions like this, when the Court has questions  
14 like this, how do I determine what is relevant? And the  
15 Court identified the appropriate condition that it had to  
16 determine, what was the activity in the marketplace that  
17 relates to these parties.

18 And what Rule 104 says is you should -- actually,  
19 the rule says you must consider -- it's not just evidence.  
20 You can also consider inadmissible information to determine  
21 whether a reasonable juror could determine that there was a  
22 material fact that relates to, in this case, the  
23 genericness of the guitars from way back when.

24 And all I've heard is we want to show it, not why  
25 50, 60, 70 years ago is important to a case that's being

1 decided in 2022.

2 Thank you, your Honor.

3 MS. NAYDONOV: Your Honor?

4 THE COURT: Go ahead.

5 MS. NAYDONOV: Very briefly.

6 On the last question, as to why, to make clear,  
7 Gibson is asserting they entered the marketplace, for  
8 example, with the Flying V and Explorer shapes in 1958.  
9 They are asserting trademark rights dating back to that  
10 date. They want to tell the jury, "We've used the mark for  
11 so long, supposedly exclusively. We rely on all these  
12 years of supposed trademark rights."

13 We want to tell a very different story. "You  
14 never had trademark rights, including dating this far back,  
15 because in the '50s, '60s, '70s there were scores of third  
16 parties."

17 And I'm sorry that it's burdensome for Gibson now,  
18 after 40 years of delay and lack of policing of their  
19 rights, to deal with all of this. I'm sorry, but that's  
20 the reality of the situation when marks become generic.  
21 That is why.

22 And that's what Courts consider in the genericness  
23 analysis. Like when the Fender Stratocaster shape was  
24 found generic, the Courts in -- the TTAB in 2009 looked at  
25 evidence dating back to the '70s; Swedish Fish gummy candy,

1 looked at decades of evidence and concluded because of this  
2 decades of evidence, there is no trademark significance  
3 left. So that is why and, as I said, we would present the  
4 evidence in a very efficient manner.

5 Now, with regard to dormancy, which is completely  
6 different and --

7 THE COURT: Let me just ask you. The issue of the  
8 fish-shaped gummy candy, that was in a completely different  
9 context than we have here because wasn't that whole issue  
10 on product configuration and trade dress infringement and  
11 not what we have here?

12 MS. NAYDONOV: Well, your Honor, this case -- we  
13 think it's actually very similar because it also involves  
14 the trade dress. It involves the configuration of the  
15 guitars.

16 So in the -- in the Swedish Fish case, it was the  
17 configuration of the actual candy. In this case they are  
18 claiming they own an outline of the guitar, Flying V. They  
19 own an outline of the guitar. So it was the exact same  
20 thing. It was the trade dress and the genericness of the  
21 trade dress.

22 As well as in the Fender, Fender Stratocaster,  
23 very commercially successful guitar; and they tried to  
24 obtain trademark rights in the outline of the shape of the  
25 guitar -- very much like Gibson is trying to say "We own

1 the outline of the V, of the Explorer guitar" -- and they  
2 couldn't get it. It was found to be generic because of the  
3 decades of widespread third-party use, just like here,  
4 other guitar companies using the same or similar guitar  
5 shape.

6 The TTAB looked at it. The Court in the Swedish  
7 Fish case -- there are other examples -- looked at it and  
8 said, no, we're going to look at the whole history for  
9 decades or years or whatever it is. There are other  
10 companies who used this same or similar shape, so there is  
11 no significance -- trademark significance of this shape.

12 And if somehow we're only allowed to present what  
13 third parties have done in '92 going forward, the jury will  
14 think there were no third parties from '58 when they  
15 started asserting their trademarks to '92. They'll think  
16 that it was just them; but that is not true, your Honor.  
17 We've provided samples.

18 And to the extent counsel is suggesting that it's  
19 just a preliminary ruling and we should approach the bench,  
20 your Honor, we're approaching the bench now for opening  
21 statements and cross-examination at trial starting on  
22 Monday.

23 So that's on the issue of genericness as to why.

24 On the issue of supposed dormancy, which we  
25 disagree. We've been around since '77, no abandonment. We

1 bought the -- the current owners, Armadillo, bought the  
2 company. Dean Zelinsky -- and it's in the Oscar Mederos  
3 declaration in front of you which, again, Gibson stipulated  
4 is admissible at trial. He says (as read): "I am familiar  
5 with the Tropical Music purchase, ownership, and sale of  
6 Dean Guitars, Inc.," company. He purchased the company.

7 Dean Zelinsky also, in his deposition testimony  
8 which we will present at trial, said he sold the company  
9 and the company was later sold to Armadillo.

10 But to once again reiterate, you don't need to  
11 sell the entire business to validly transfer the mark. As  
12 I was mentioning this morning, the Crunch candy Nestle sold  
13 to Ferrero. Nestle didn't have to sell its entire  
14 conglomerate to transfer the rights of the brand. And  
15 there is good reason under trademark law. You can sell a  
16 brand because -- a trademark, all it is is it represents  
17 the goodwill. So when you sell the trademark, you sell the  
18 underlying goodwill.

19 So when they sold -- when Elliott Rubinson and  
20 other witnesses have said we sold the brand, that entails  
21 with it the name, logo, and the underlying goodwill, which  
22 is the guitars. So we absolutely sold the company, and  
23 also the sale of the trademark is alone sufficient as well.

24 And we just believe, your Honor, that we're  
25 entitled to tell our story to the jury and have them weigh

1 all this evidence on the question of laches as well as on  
2 the question of genericness.

3 MR. HOWEN: Your Honor, could I address --

4 THE COURT: Wait one second.

5 MR. HOWEN: Of course.

6 MS. NAYDONOV: I'm so sorry. One more point, your  
7 Honor. I'm sorry.

8 On the third-party evidence, your Honor has  
9 already determined in prior rulings -- Docket 170,  
10 Docket 183, Docket 267 -- how important this evidence is.

11 170. "The third-party sales data are at the core  
12 of Armadillo's argument that Gibson's marks are generic.  
13 It is therefore necessary to Armadillo's defense."

14 Docket 267 denying a *Daubert* motion to exclude  
15 testimony of George Gruhn, who is going to be our music  
16 history expert. "Gruhn's opinion aids the jury by  
17 providing insight into Gibson's trademarks and relevant  
18 third-party usages of similar guitar shapes."

19 So your Honor already recognized how critical it  
20 is, and we would be basically cut off at our knees if we  
21 cannot present the full scope of these third-party uses.

22 And last point for -- a separate issue for the  
23 laches. It's absolutely -- we have a valid chain that we  
24 can tag back to 1977. We have evidence that we have shown  
25 to your Honor this morning, and that we will present to the

1 jury, that the business and underlying goodwill passed from  
2 Dean Zelinsky to Tropical, from Tropical to Armadillo and  
3 Concordia.

4 To the extent they disagree, they can  
5 cross-examine the witnesses. They can tell the jury what  
6 they've been telling you today, but it's ultimately for  
7 them to decide.

8 Thank you.

9 THE COURT: Thank you.

10 MR. HOWEN: Your Honor asked about the Swedish  
11 Fish case. That case was a product configuration claim on  
12 a trademark dilution issue. We're not seeking recompense  
13 for trademark dilution in this case, and so I think the  
14 Court's instinct was correct. It's inapplicable here.

15 The Stratocaster case, that was an application  
16 proceeding. It was not anything like what's going on in  
17 this Court.

18 They complained that if you stick by this ruling  
19 there will be -- well, they point out that in other cases  
20 there are decades of third-party uses allowed for the jury  
21 or the TTAB to hear. There will be decades in this case  
22 for them to hear.

23 And, again, I -- I've beat a dead horse. Thank  
24 you.

25 THE COURT: Okay. So, of course, the Court has

1 already entered a decision and, of course, I will revisit  
2 my ruling and, of course -- I wish I could say I've devoted  
3 the whole day to your case. I haven't. I've had so many  
4 other matters going on. So I will try to revisit it, look  
5 at it. Again, the goal of the Court is trying to get it  
6 right and -- I wasn't certainly trying to cut the defense  
7 off at their knees. Both sides get to tell their stories.  
8 So -- but unless I change something between now and Monday  
9 morning, you know -- well, hopefully by Monday morning I'll  
10 have it completely resolved because we'll have *voir dire*  
11 first, before we ever get to opening statements.

12               Okay. This is -- this is a good problem for the  
13 Court to have, when you have such good lawyers.

14               They are reminding me that CM/ECF is going to be  
15 down this weekend. We are switching to Next Generation.  
16 So if I do something over the weekend, it won't be a docket  
17 order. If I get something done this weekend, it will be  
18 a -- we'll send an email. It won't get docketed until  
19 Monday, until ECM is back up. I'm glad they reminded me  
20 because I keep forgetting. They have reminded me three  
21 times now, and they had to pass me another note to remind  
22 me.

23               No. This is good problem for the Court to have,  
24 when you have such good lawyers for both sides. I was just  
25 interviewing law clerks this week and I said to the law

1 clerk -- I always ask the prospective law clerks, "What do  
2 you do when you have really good lawyers on both sides,  
3 really good briefing on both sides, and you have to make a  
4 decision -- at least you have to make a recommendation to  
5 me on how to resolve a motion?" And so I find myself  
6 perplexed in the same situation. I've made a decision.  
7 But I also want to make sure I got it right, so I will  
8 ponder that.

9 Let me ask. I entered another order that, I  
10 think, resolves some of the other bigger issues that we had  
11 left over. Hopefully you saw that, regarding -- now, I  
12 will say, because something came up today regarding the one  
13 declaration, I think I made it -- there was one of the  
14 issues, I think, that Gibson raised regarding the  
15 declarations for business records that went on and had  
16 other things in them, that went into much more detail than  
17 a normal business record affidavit. And that's what I  
18 certainly was discussing regarding saying that those -- the  
19 exhibits would come in but not the declarations in that  
20 situation.

21 That in no way was saying that if the parties have  
22 agreed to certain declarations coming in, those couldn't be  
23 entered into evidence. I wasn't interfering with the  
24 parties' agreements that certain declarations might come  
25 in. That issue, which I think I just dealt with in a

1 sentence or two, just indicated that it was dealing with  
2 the issue of the declarations that -- for business records  
3 that wasn't your typical two-page declaration. But I think  
4 I -- I think I resolved some other issues there.

5 So I guess the question is what other loose ends  
6 do you need from me at this point as we begin to start jury  
7 selection on Monday?

8 MR. HOWEN: Your Honor, I actually had not seen  
9 the order. Can I look at it real quick?

10 THE COURT: Yeah, go right ahead.

11 Has defense seen the order that I'm referring to?

12 MR. RODGERS: Yes, your Honor.

13 THE COURT: It was docketed before we got here  
14 but --

15 MR. HENRY: May I inquire just sort of --

16 THE COURT: Make sure you have a mic on, just --  
17 and that is for the purpose of the court reporter. I can  
18 hear you, but everything needs to go through the sound  
19 system so the jury all hears.

20 And that is something I will remind everyone. I  
21 don't know who is going to be doing the *voir dire*. Just  
22 make sure you speak up because it's something we keep  
23 addressing and we get complaints from the jury that --  
24 during *voir dire*, just the way the speaker system is. It  
25 is not as big an issue in the jury box but since they will

1 all be back in the gallery.

2 MR. HENRY: With respect to the order that you  
3 just referenced --

4 THE COURT: If you have a question about that,  
5 wait. Mr. Howen hasn't read it yet.

6 MR. HENRY: I apologize.

7 THE COURT: No, no. No offense about that.

8 MR. HOWEN: I have read it, your Honor; and I  
9 believe that we don't have anything to bring up after that  
10 so --

11 THE COURT: Okay. Go ahead.

12 MR. HENRY: Just kind of logistics. So you had  
13 told us Wednesday that for an exhibit, if it's referenced  
14 by a witness, then that means it's coming in. Basically  
15 for preadmitted exhibits, I guess, is what I'm --

16 THE COURT: Well, we're talking about just my  
17 policy on exhibits. If exhibits are -- I will preadmit all  
18 of the exhibits, conditionally admit the exhibits, at the  
19 beginning of evidence if it is not objected to or I've  
20 overruled the objection. My rule is you just have to use  
21 it with a witness for it to be fully admitted.

22 Is that what you are referring to or something  
23 else?

24 MR. HENRY: Well, I apologize if I'm not  
25 articulating it well.

1           If -- for instance, the documents that are  
2 attached to these declarations, if a -- we still have to  
3 use that with a witness and then offer it at that time?

4           THE COURT: Well -- so in those situations where  
5 there is really no objection to those, you would just use  
6 the actual attached records with the witness --

7           MR. HENRY: Okay.

8           THE COURT: -- those exhibits, and they would be  
9 fully admitted once you use them because there is not an  
10 objection anymore.

11          MR. HENRY: Got it.

12          THE COURT: And there was really never an  
13 objection -- the objection was whether the declaration  
14 would come in, and I'm not so worried about that. It's  
15 just we'll have to make sure we remove the declarations  
16 before it goes back to the jury.

17          MR. HENRY: Got it. Thank you, your Honor.

18          THE COURT: Okay.

19          MR. HOWEN: Your Honor, I think -- I don't want to  
20 put words in his mouth, but I think what he was saying is  
21 that those are business records of third parties that are  
22 never going to show up here. They will likely want to  
23 argue them, but there is no witness to ever give them to to  
24 comment on them because those -- because they're attached  
25 to a declaration.

1           And so I think what they're saying is can we just  
2 argue them without having shown them to any witness, and we  
3 would -- we would say yes. I mean, we wouldn't have any  
4 objection to that aspect of it.

5           THE COURT: Well, that's fine. I understand that.  
6 I assume that some witness or an expert or someone is going  
7 to be using those exhibits.

8           MR. HOWEN: I don't think so.

9           THE COURT: Maybe not. Okay. That's fine. Just  
10 make sure -- so in that situation where -- you just need to  
11 show it to the jury. So you would identify, you know,  
12 these are business records, the exhibits. You can put them  
13 on the ELMO or electronic or whatever. Just utilize it in  
14 front of the jury in some fashion.

15           And you don't have to go through every page.  
16 That's not required.

17           MR. HENRY: Could we just say, Judge, we're  
18 offering exhibit such-and-such?

19           THE COURT: I'm okay with that generally, but the  
20 issue I have is if that's going to be done a lot so -- in  
21 terms of flooding the record with exhibits the jury never  
22 sees.

23           So I'm not saying I won't grant an exception to  
24 that, but it has to be shown to the jury in some fashion.  
25 And I understand you may not have a witness to talk about

1 it. That's fine. But you need to at least show the jury,  
2 here are these records, you know, and they are preadmitted  
3 and we're offer -- it's not that you're offering them.  
4 It's just that you have to do -- you can do that -- you  
5 don't have to go through every page.

6 MR. HENRY: With the protocol being, "Your Honor,  
7 may I address the jury about exhibit such-and-such" and  
8 then --

9 THE COURT: Yeah. We can see how it goes but, I  
10 mean, it sounds like both sides may have some of these  
11 so -- right?

12 MR. HOWEN: We don't.

13 THE COURT: Oh, okay.

14 MR. HOWEN: Our witnesses will talk about all our  
15 exhibits.

16 THE COURT: That's fine.

17 MR. HENRY: Thank you, your Honor.

18 MR. HOWEN: Actually, two things, your Honor. I  
19 was reminded that the Court had granted our -- sustained  
20 our objections on the cut-and-splice, what I called; and we  
21 haven't -- we need to work out a procedure for the exchange  
22 of the modified depositions, the video depositions.

23 The second thing was -- and when I looked at the  
24 order I realized -- a second time -- I did realize it  
25 doesn't speak to the company representative objection that

1 we raised, that we're having people speak without personal  
2 knowledge and, on top of that, representing themselves as  
3 to be the company represent -- speaking on behalf of the  
4 company when that company is not in the courtroom, not a  
5 party. That was all in the briefing. I don't want to  
6 reargue it, but the ruling does not address that.

7 THE COURT: Yeah. I don't think I addressed that,  
8 so that's a loose end I'll have to tie up.

9 MR. HOWEN: And again, your Honor, those are for  
10 videos that would be played after our case, so I don't see  
11 that being a huge time crunch sort of thing.

12 THE COURT: No, I understand. I understand.

13 MR. HOWEN: And then we do have a question on  
14 logistics. We would like the guitars --

15 MR. RODGERS: If I may on the last point, before  
16 we go to logistics?

17 THE COURT: That's fine.

18 MR. RODGERS: First, on the cut-and-splice, we are  
19 working on that with the opposing side for -- to resolve  
20 those.

21 And then on the personal knowledge issue, just to  
22 reiterate, it was our position that all of these witnesses  
23 had the personal knowledge necessary.

24 THE COURT: I understand.

25 Okay. Logistics?

1                   MR. HOWEN: So we'd like the guitars to be in the  
2 courtroom, and it is actually -- it is a logistical issue  
3 to get things moved up and moved down. Can they be up  
4 during *voir dire*? We'd be happy to meet them or stay  
5 around a little bit to try and figure out how we can do it  
6 fairly and make sure, you know, that's all arranged. But  
7 if we tried to do it on Monday morning, I think Ms. Conrad  
8 and the CSOs would be running into them and --

9                   THE COURT: Have you discussed this with the  
10 defense?

11                  MR. HOWEN: Actually, my discussions have been  
12 with Emileigh mostly; but we have discussed briefly how we  
13 might handle it. She was the one that brought up that  
14 given all of our guitars combined, that this might be an  
15 issue so --

16                  THE COURT: Well, I assume both sides have  
17 guitars, right, that they want to bring?

18                  MR. HENRY: Yes, your Honor.

19                  THE COURT: How many are there for each side that  
20 you want to display?

21                  MS. NAYDONOV: Your Honor, there are a lot of  
22 guitars on both sides, a lot of them that we would like to  
23 display. But I think we can work together to rotate them  
24 in and out so they are not flooding the courtroom at all  
25 times. So I don't know if we need to bother the Court at

1 this time.

2 THE COURT: Oh, your mic is not on.

3 MS. NAYDONOV: Oh.

4 THE COURT: I just turned mine off, too, but --

5 MS. NAYDONOV: I think the battery is out.

6 So I was saying that at all times I think there  
7 will be guitars in the courtroom for both sides. Both  
8 sides have a lot of physical guitars on their exhibit  
9 lists, but I propose that we coordinate on --

10 MR. HOWEN: I guess we'd like to do that now. I  
11 mean, we would need the Court to do it, obviously.

12 THE COURT: Okay. Well, let me -- I have to get  
13 off the bench and kind of look at space here and see but --  
14 we'll talk about that here in a second.

15 But any other issues?

16 MR. HENRY: Can I address that real quick? I  
17 think there might be an easy solution.

18 If we could agree on what we're going to do Monday  
19 with *voir dire*, then for the rest of the trial, we can use  
20 the benches because people won't be back there and we could  
21 work out some kind of --

22 THE COURT: I understand that, yeah. I just want  
23 to -- I need to get off the bench and look and see where we  
24 have space to put those.

25 Any other issues, then, just before --

1 MR. HOWEN: I don't believe so.

2 THE COURT: -- before we stop for the day and  
3 then --

4 MR. RETTEW: Sorry to add on, your Honor, but  
5 there is one issue.

6 On the -- on the demonstrative that we showed that  
7 we would like to use in opening, beyond the issue of the  
8 time period that your Honor is considering, we've been  
9 working with Mr. Howen on trying to get agreement on what  
10 we can show in our opening; and one issue that's come up is  
11 documents that show the guitars that were obtained through  
12 the Wayback Machine, the Internet Wayback Machine.

13 And so the parties have a dispute over whether we  
14 can show those guitars, and so that's one issue. I just  
15 wanted to make sure before we open. I don't want to use  
16 anything in my opening that is going to draw an objection  
17 or that the Court would not want us to use.

18 MR. HOWEN: He's correct. We had that discussion,  
19 and I will confess that I had somebody doing the research  
20 for me, actually, not with me. The case that we saw seemed  
21 to pretty clearly indicate you can't -- a Fifth Circuit  
22 case -- seemed to pretty clearly indicate that just a  
23 Wayback Machine, you know, front page to it saying "I got  
24 this from the Wayback Machine" is not a proper  
25 authentication.

1                   MR. RETTEW: And, your Honor, I'll let Mr. Rodgers  
2 address that because he knows a lot more about this than I;  
3 but I do know that that case just dealt with an issue of  
4 judicial notice and didn't have a sponsoring witness like  
5 we are eventually going to have through our expert. But  
6 I'll defer to somebody who knows a lot more on this than I  
7 do, if I may.

8                   MR. HOWEN: Well, your Honor, I can probably  
9 short-circuit that. On authenticity, if they have a  
10 good-faith belief that they can prove it up authentic  
11 without the Wayback Machine, that's up to them, but --

12                  MR. RODGERS: I'm not entirely sure on counsel's  
13 argument there. We have not requested judicial notice at  
14 this point.

15                  And the Fifth Circuit case that I believe opposing  
16 counsel is referring to is the *Weinhoffer* case, which was  
17 out of the Fifth Circuit earlier this year where the Court  
18 did indeed hold that judicial notice of a Wayback Machine  
19 document was inappropriate. But it also explicitly says  
20 that these types of documents are appropriate where someone  
21 with personal knowledge of the reliability of the archive  
22 service has been authenticated pursuant to Rule 901.

23                  And we are going to be offering a sponsoring  
24 witness, George Gruhn, who will testify that he, through  
25 his research assistant, which your Honor has already deemed

1 was appropriate for him to use in the preparation of his  
2 report, used the Wayback Machine. And the Wayback Machine  
3 is used in the ordinary course of people like Mr. Gruhn who  
4 are music historians in developing opinions like the ones  
5 that he issued in this case. So we will have a sponsoring  
6 witness testifying as to the reliability of the Wayback  
7 Machine.

8 And in addition to that, your Honor, there are  
9 numerous other indicia of reliability on these Wayback  
10 Machine documents that we believe under Rule 901(b) (4)  
11 would be sufficient for these documents to come in. These  
12 documents show the websites of various third parties  
13 captured through the archive -- Internet archives Wayback  
14 Machine where the company's trademark is on the website,  
15 the guitars are shown, and the URLs of the companies  
16 themselves along with the capture data.

17 THE COURT: And you're just talking about  
18 demonstratives you're going to be using during opening?

19 MR. RODGERS: That's correct.

20 THE COURT: So in my view, I'm not worried about a  
21 demonstrative that you're going to use in opening  
22 statement. And whether the evidence comes in or not,  
23 that's an issue for later.

24 Okay. Anything else?

25 Okay. We will be in recess, and let me just --

1 Keary, if you want to come down with me and we can  
2 look at space here.

3 (Proceedings concluded, 3:50 p.m.)

4 COURT REPORTER'S CERTIFICATION

5 I HEREBY CERTIFY THAT ON THIS DATE, SEPTEMBER 19,  
6 2022, THE FOREGOING IS A CORRECT TRANSCRIPT FROM THE RECORD  
7 OF PROCEEDINGS.

8

/s/  
CHRISTINA L. BICKHAM, CRR, RDR

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